DKSH Malaysia Sdn Bhd v Hantaran Asia Sdn Bhd

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO BKI-22–283/12 OF 2012
RAVINTHRAN J
14 JULY 2015

Contract — Termination — Termination clause — Plaintiff entered into lease agreement with defendant — Termination of agreement due to defendant's failure to honour agreement — Plaintiff obtained performance bond sum and also summary judgment for security deposit — Defendant counterclaimed for recovery of performance bond sum — Whether termination clause operated automatically — Whether agreement rendered 'null and void' due to operation of automatic termination clause — Whether plaintiff could terminate agreement and call on performance bond

The plaintiff had entered into an agreement to lease a warehouse which was to be constructed by the defendant. For the purpose of the agreement, the plaintiff paid a security deposit of RM414,000 to the defendant whereas the defendant provided a performance bond of RM500,000 to the plaintiff. In contrary with the agreement, the defendant had failed to meet the 23 July 2011 deadline to submit the building plan to the authorities and the 23 April 2012 deadline to obtain approval of the building plan. Subsequently, in a meeting between the parties, the plaintiff was assured that the defendant would obtain approval for the revised development plan and the revised building plan at the latest by 18 May 2012. The defendant again failed to meet the new deadline as discussed by both parties and by letter dated 23 May 2012, the plaintiff terminated the agreement. The plaintiff then wrote to Malayan Banking Bhd to call on the performance bond and received the cheque for the sum of RM500,000 from the bank on 16 June 2012. The plaintiff also succeeded in obtaining summary judgment to recover the security deposit. The present action was in respect of the counterclaim of the defendant for a recovery of the performance bond which was not dealt with at the pre-trial stage. The defendant submitted that the agreement was automatically 'rendered null and void' by 24 July 2011 as they failed to submit the building plan to the authorities within two months from the date of agreement. The plaintiff in reply submitted that the automatic termination clause did not operate as the parties mutually agreed to continue with the agreement and therefore the defendant was estopped from pleading that the agreement was rendered null and void. The first issue was centered on the operation of the automatic termination clause on the facts of this case whereas the second issue related with the contractual consequences that would flow from a finding that the agreement was automatically terminated.

Held, dismissing the defendant's counterclaim:

(1) Based on the authorities and the facts of this case, the automatic termination clause did not terminate the agreement. The plaintiff had reserved their right to terminate the agreement after the defendant missed the first deadline to submit the plan but the fact was that, they did not do so. Thus the plaintiff had impliedly waived the first deadline. Further, by asking additional time to obtain approval for the plan despite missing the deadline, the defendant must be deemed to have treated the agreement as subsisting. As such, the doctrines of estoppel and waiver would operate to prevent the operation of the automatic termination clause. Estoppel would apply as the parties had proceeded on the assumption on the basis that the contract subsisted (see para 13).

(2) The phrase 'null and void' made no difference as the defendant had conducted his dealings with the plaintiff on the assumption, whether by mistake or otherwise, that the contract subsisted. Therefore, the agreement was not rendered 'null and void' but continued by the implicit agreement of the parties until it was expressly terminated by the plaintiff when the defendant failed again to meet another deadline. The defendant was the wrongdoer and therefore should not be allowed to take advantage of his own wrong (see para 17).

(3) Since the agreement was not rendered 'null and void' when the defendant missed the deadline to submit the plan for approval, the plaintiff was well within their contractual rights to terminate the agreement and call on the performance bond that was given by the defendant (see para 18).

[Bahasa Malaysia summary

Plaintif telah memasuki perjanjian untuk menyewa gudang yang akan dibina oleh defendan. Bagi tujuan perjanjian, plaintif membayar deposit jaminan sejumlah RM414,000 kepada defendan di mana defendan memperuntukkan bon pelaksanaan sejumlah RM500,000 kepada plaintif. Bertentangan dengan perjanjian tersebut, defendan gagal untuk menepati tarikh akhir 23 Julai 2011 untuk menyerahkan pelan bangunan kepada pihak berkuasa dan tarikh akhir 23 April 2012 untuk mendapatkan kelulusan pelan bangunan. Kemudiannya, dalam mesyuarat di antara pihak-pihak, plaintif diyakinkan bahawa defendan akan mendapatkan kelulusan untuk pelan pembangunan yang disemak semula dan pelan bangunan yang disemak semula selewat-lewatnya pada 18 Mei 2012. Defendan sekali lagi gagal untuk menepati tarikh akhir baru seperti yang dibincangkan oleh kedua-dua pihak dan melalui surat bertarikh 23 Mei 2012, plaintif menamatkan perjanjian tersebut. Plaintif kemudiannya menulis kepada Malayan Banking Bhd menuntut bon pelaksanaan dan menerima cek bagi sejumlah RM500,000 daripada bank pada 16 Jun 2012. Plaintif juga berjaya dalam mendapatkan penghakiman terus untuk mendapatkan kembali deposit jaminan. Tindakan ini adalah berkaitan tuntutan balas defendan untuk

mendapatkan semula bon pelaksanaan yang tidak dituntut pada peringkat pra perbicaraan. Defendan berhujah bahawa perjanjian secara automatik 'rendered null and void' pada 24 Julai 2011 kerana ia gagal untuk menyerahkan pelan bangunan kepada pihak-pihak berkuasa dalam masa dua bulan dari tarikh perjanjian tersebut. Plaintif dalam menjawab berhujah bahawa klausa penamatan automatik tidak beroperasi kerana pihak-pihak bersetuju secara bersama untuk meneruskan dengan perjanjian dan oleh itu defendan diestop daripada memplid bahawa perjanjian adalah batal dan tak sah. Isu pertama adalah ditumpukan ke atas operasi klausa penamatan automatik atas fakta kes ini sementara isu kedua adalah berkaitan akibat kontraktual yang akan berjalan daripada dapatan bahawa perjanjian ditamatkan secara automatik.

Diputuskan, menolak tuntutan balas defendan:

(1) Berdasarkan autoriti-autoriti dan fakta kes, klausa penamatan automatik tidak menamatkan perjanjian tersebut. Plaintif mempunyai hak untuk menamatkan perjanjian tersebut selepas defendan terlepas tarikh akhir pertama untuk menyerahkan pelan tetapi sebenarnya, mereka tidak berbuat sedemikian. Oleh itu plaintif secara tersirat mengetepikan tarikh akhir pertama. Selanjutnya, dengan memohon masa tambahan untuk mendapatkan kelulusan bagi pelan meskipun melepasi tarikh akhir, defendan mesti dianggap sebagai menyifatkan perjanjian sebagai wujud. Dengan itu, doktrin-doktrin estopel dan pengecualian akan beroperasi untuk mengahalang operasi klausa penamatan automatik. Estopel akan beraplikasi kerana pihak-pihak telah meneruskan atas anggapan asas bahawa kontrak masih wujud (lihat perenggan 13).

(2) Frasa 'null and void' tidak membuat sebarang perbezaan kerana defendan telah menjalankan urusannya dengan plaintif atas anggapan, sama ada atas kesilapan atau sebaliknya, bahawa kontrak tersebut wujud. Oleh itu, perjanjian tidak dijadikan 'null and void' tetapi berterusan atas perjanjian tersirat pihak-pihak sehingga ia ditamatkan secara nyata oleh plaintif apabila defendan sekali lagi gagal untuk menepati tarikh akhir yang lain. Defendan adalah orang yang berbuat salah dan oleh itu tidak patut dibenarkan untuk mengambil keuntungan atas kesilapannya sendiri (lihat perenggan 17).

(3) Memandangkan perjanjian tidak 'null and void' apabila defendan terlepas tarikh akhir untuk menyerahkan pelan bagi kelulusan, plaintif adalah dalam hak kontraktual mereka untuk menamatkan perjanjian dan menuntut ke atas bon pelaksanaan yang diberikan oleh defendan (lihat perenggan 18).]

Notes

For cases on termination clause, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7092–7093.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidazion) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2013] 6 MLJ 836; [2013] 7 CLJ 969, CA (refd)
Moreton v Montrose Ltd [1986] 2 NZLR 496, CA (folld)
New Zealand Shipping Company, Limited v Société Des Ateliers Et Chantiers De France [1919] AC 1, HL (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)

Saiful Azian Mokhtar (Jayasuriya Kah & Co) for the plaintiff.
Lim Pitt Kong (PK Lim & Co) for the defendant.

Ravinthran J:

INTRODUCTION

[1] The plaintiff had entered into an agreement to lease a warehouse which was to be constructed by the defendant. The plaintiff paid a security deposit of RM414,000 to the defendant. The defendant provided a performance bond of RM500,000 to the plaintiff. The plaintiff failed to construct the warehouse within the stipulated time. The plaintiff collected the performance bond sum of RM500,000 from the bank and sued for the security deposit. The defendant counterclaimed against the plaintiff for return of the performance bond sum of RM500,000 that the plaintiff collected from the bank. The plaintiff succeeded in obtaining summary judgment to recover the security deposit. There is no appeal by the defendant in respect of the summary judgment. The trial before me is in respect of the counter claim of the defendant which was not dealt with at the pre-trial stage.

BACKGROUND FACTS

[2] The facts of this case are largely undisputed. The plaintiff and defendant had entered into an agreement which was described as a memorandum of understanding. Under the agreement, the plaintiff who is described as 'Tenant' had agreed to lease a warehouse which was to be constructed by the defendant. The construction cost was to be borne by the defendant. Under the agreement, the plaintiff was obliged to provide security deposit of RM414,000 to secure its end of the bargain to lease the warehouse. On the other hand, the defendant furnished to the plaintiff a performance bond for the sum of RM500,000 for the due performance and observance of the agreement. The agreement provided a time stipulation in respect of the construction of the warehouse in cl 4 which is as follows:

> The Developer shall apply for and obtain the necessary building approvals from the local authorities for the construction of the Warehouse within six (6) months from the date of submission of the building plans. An extension period of another three (3) months shall be granted by the tenant in the event there is a delay of approvals from the local authorities. The building plans shall be submitted within two (2) months from the date of the execution of this MOU failing which this MOU shall be automatically rendered null and void.

[3] The deadline to submit the building plan to the authorities under cl 4 was 23 July 2011 which is two months after the date of the agreement. The deadline to obtain approval for the building plan was 23 April 2012 if the six month period from the date of submission of the plan plus the three month extension period under cl 4 is taken into account. It is common ground that the defendant only submitted the building plans for approval on 19 December 2011. The defendant had also failed to meet 23 April 2012 deadline to obtain approval for the building plan from the relevant authority.

[4] The undisputed correspondence between the parties after 19 December 2011 reveals the following. On 25 January 2012, the plaintiff raised the issue of delay in submitting building plans and warned about the 23 April 2012 deadline to obtain approval from the relevant authority. In reply to the letter from the plaintiff dated 25 January 2012, amongst other things, the defendant explained the reasons for the delay and urged the plaintiff not to terminate the agreement. They also stated that they might require an extension of time to obtain approval for the building plan beyond 23 April 2012 deadline due to unfortunate circumstances. Sometime on 3 or 4 May 2012, the parties held a meeting where the plaintiff was assured that the defendant would obtain approval for the revised development plan and the revised building plan at the very latest by 18 May 2012. On 7 May 2012, the plaintiff wrote to the defendant to state that if they had not obtained the development plan by 18 May 2012, the plaintiff reserved their right to terminate the agreement. On 17 May 2012, the defendant wrote to the plaintiff through their solicitors, Messrs Tan Chong & Associate to seek a two week extension. On 23 May 2012, the plaintiff replied that they are not granting the requested extension and are terminating the agreement. They also demanded the return of the security deposit of RM414,000. The plaintiff also wrote to Malayan Banking Bhd to call on the performance bond issued by the bank in the sum of RM500,000. On 16 June 2012, Malayan Banking Bhd issued a banker's cheque for the sum of RM500,000 to the plaintiff. On 2 August 2013, the plaintiff obtained summary judgment against the defendant for the recovery of the sum of RM414,000 for the security deposit together with statutory interest.

COUNTERCLAIM OF THE DEFENDANT

[5] The counterclaim of the defendant is for recovery of the performance bond sum of RM500,000 from the plaintiff. Their case is that the agreement (described as the memorandum of understanding) was automatically 'rendered null and void' by 24 July 2011 as they failed to submit the building plan to the relevant authority within two months from the date of the agreement. The defendant called two witnesses to testify on their behalf. DW1 who is the managing director of the defendant testified that both the plaintiff and defendant executed the agreement including an addendum involving the parcel of land held under CL 015021691. Under the agreement, the defendant who is the developer would construct a warehouse and thereafter to sublease it to the plaintiff who is known as a tenant. The plaintiff was required to pay RM414,000 as security deposit and on the other hand, the defendant was obliged to furnish to the plaintiff a performance bond of RM500,000. However, DW1 explained that the agreement was drafted by the plaintiff and presented to him as a 'non-negotiable document'. DW2 is an advocate and solicitor. DW1 agreed that the building plans were submitted late, ie on 19 December 2011. He candidly admitted that the defendant intended to continue with the agreement at that time. He also admitted that in the letter dated 6 March 2012, the defendant urged the plaintiff not to terminate the agreement as it will lead to a 'lose-lose' situation. However, DW1 said that at the material time, it did not occur to him or the plaintiff that the agreement had been automatically rendered null and void with effect from 24 July 2011. He said since the agreement was automatically rendered null and void, there was nothing for the plaintiff to terminate. For that reason, he said that the plaintiff cannot invoke the performance bond clause and claim payment of RM500,000 from Malayan Banking Bhd.

DEFENCE TO COUNTERCLAIM

[6] The gist of the plaintiff's defence to the counterclaim is that the automatic termination clause did not operate as the parties mutually agreed to continue with the agreement and therefore the defendant is estopped from pleading that the agreement is rendered null and void. The sole witness for the plaintiff was its regional manager ('PW1'). He said that although the defendant exceeded the stipulated deadline to submit the building plan for approval, the plaintiff later granted extension of time to the defendant to obtain approval for the building plan. However, he said that by letter dated 25 January 2012 the plaintiff reiterated their position that the approval for the building plans must be obtained on or before 23 April 2012, after taking into account the three months extension of time. He said that the defendant failed to obtain the approval of the building plans from the local authorities by 23 April 2012 in accordance with cl 4 of the agreement. A meeting was held between the parties in which the plaintiff granted a further extension of time until 18 May 2012 to

enable the defendant to obtain the approval to the building plan. PW1 said that the plaintiff was not agreeable to a further extension of time requested by the defendant and terminated the agreement via letter dated 23 May 2012 and demanded refund of the security deposit of RM414,000. He said the plaintiff never waived their right to call on the performance bond as they issued a letter to the bank on the same day.

ISSUES AND BURDEN OF PROOF

[7] The parties have submitted the following agreed issues for trial:

Question 1

Whether the written agreement described as a 'Memorandum of Understanding' dated 23.05.2011 entered into between the Plaintiff of the one part and the Defendant of the other part with Addendum (hereinafter referred to as 'the said Agreement') was automatically rendered null and void pursuant to the terms thereof or otherwise frustrated when the Plaintiff subsequently:

(a) purported to terminate the said Agreement by letter dated 23.05.2012?;

and

(b) purported to invoke the Defendant's Performance Bond for RM500,000.00 on or around 23.05.2012?

Question 2

If Question 1 is answered in the affirmative:

(a) whether there is any basis (based on the matters and/or issues pleaded in the Plaintiff's Amended Reply and Amended Defence to Amended Counterclaim dated 11.10.2013) for the Plaintiff to terminate the said Agreement on 23.05.2012 and invoke the Defendant's Performance Bond on or around 23.05.2012 by obtaining payment thereof amounting to RM500,000.00 against the account of the Defendant?; and

(b) if there is no basis for the Plaintiff to terminate the said Agreement on 23.05.2012:

(i) whether the Plaintiff had wrongfully claimed the said Performance Bond amount of RM500,000.00 in breach of the said Agreement against the account of the Defendant?; and

(ii) if so, whether the Defendant is entitled to recover all or any of the reliefs claimed against the Plaintiff as prayed for in Prayers (a) to (j) inclusive of the Amended Counterclaim amended on 11.09.2013?

[8] In summary, first issue is centred on the operation of the automatic termination clause on the facts of this case. The second issue deals with the contractual consequences that would flow from a finding that the agreement was automatically terminated.

[9] As for the burden of proof, the instant trial is only concerned with the counterclaim of the defendant, ie the legality of the plaintiff's call on the performance bond of RM500,000. In the premises, the defendant bears the burden to prove that the automatic termination clause had rendered the agreement null void and that there was no basis for the plaintiff to terminate the agreement.

Question 1

[10] From my reading of the submissions, I deduce that both counsel of the plaintiff and the defendant are on common ground in respect of the validity of an automatic termination clause. In the cases cited by the parties, the courts have previously ruled that such a clause is valid. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2013] 6 MLJ 836; [2013] 7 CLJ 969, the Court of Appeal emphatically upheld the validity of an automatic termination clause. The court referred to the Privy Council case of *New Zealand Shipping Company, Limited v Société Des Ateliers Et Chantiers De France* [1919] AC 1 and the New Zealand Court of Appeal case of *Moreton v Montrose Ltd* [1986] 2 NZLR 496. On appeal, the Federal Court upheld the finding of the Court of Appeal that automatic termination clauses are valid under Malaysian Contract Law. The Federal Court also referred to a number of Malaysian cases that upheld automatic termination clauses. Therefore, there can be no dispute that automatic termination clauses that are couched in clear language are valid and must be upheld. However, the central question in this case is whether, notwithstanding the existence of an automatic termination clause, the agreement was automatically terminated. In my opinion, on the strength of the case law authorities on automatic termination clauses and the facts of this case, the question must be emphatically answered in the negative, ie that the automatic termination clause did not terminate the agreement. My reasons are as follows.

[11] Firstly, case law authorities from the Commonwealth and Malaysia do not lay down any rule of law to the effect that an automatic termination clause would operate inflexibly and inexorably regardless of the positions adopted by the parties in the carrying out of the contract in question. The Court of Appeal in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* cited with approval the following passage from *Moreton v Montrose Ltd*:

> On the first interpretation neither party is required to take positive steps to set the contract aside, although a party who wishes to take advantage of the fact that the contract is no longer in existence may be well advised to make his attitude clear, *since if he acts in a way suggesting that he regards the contract as continuing he will be at peril of a finding of waiver, election or estoppels.* On either of the two interpretations a party will disqualify himself from relying on the condition if he has brought the state of affairs about by his own default. *The rule that a party cannot take advantage of his own*

wrong in fundamental. (Emphasis added.)

[12] The Court of Appeal also cited with approval the opinion of the learned author of *Breach of Contract*, JW Carter as follows:

> JW Carter in the second edition of his book Breach of Contract supports the proposition of law that automatic termination clauses are valid subject to the qualification that the parties must expressly make known this intention on their part in the contract itself .

[13] In the instant case, there is abundant evidence to support the assertion of the plaintiff that the defendant had not only treated the contract as subsisting but had entreated the plaintiff to continue with the contract. For sake of perspective, I shall reiterate some facts that were not disputed during the trial. The deadline to submit the plans to the authorities was 23 July 2011. The agreement imposed this obligation on the defendant. Clause 4 provides that failure to meet this deadline would render the agreement 'null and void'. The defendant failed to meet this deadline which also means that it is the party in breach of the agreement. The defendant only submitted the plans on 19 December 2012. However, the parties evidently treated the agreement as subsisting. The defendant wanted extra time to obtain approval of the building plan. This request was stated by the defendant in their letter dated 6 March 2012. In the meetings held earlier on 3 and 4 of May 2012, their director Mr Foo Keat How assured the plaintiff of obtaining approvals by 18 May 2012. It may well be that the plaintiff had reserved their right to terminate the agreement after the defendant missed the first deadline to submit the plan but the fact is they did not do so. Thus the plaintiff had impliedly waived the first deadline. This is the reason, on 7 May 2012, the plaintiff granted extension to obtain approval for the building plan. Only upon failure to meet this deadline, the plaintiff terminated the agreement by 23 May 2012. However, counsel for defendant submits now that the agreement had been automatically rendered null and void much earlier when the first deadline to submit the plans by 23 July 2011 was missed by the defendant. However, the defendant never took any overt action to make clear that the agreement had been rendered null and void. I am mindful of the argument of the counsel for the defendant that the plaintiff never formally granted extension of time for submission of the plans to the local authority despite the delay by the defendant. However, I should think that this is of no consequence. By asking for additional time to obtain approval for the plan despite missing the deadline for submission of the plan, the defendant must be deemed to have treated the agreement as subsisting. In the premises, it does not lie in the mouth of the defendant now to say that the agreement had been automatically terminated. In fact, what the defendant is attempting to do is to take advantage of their own wrong to escape the consequences of breaching the agreement after pleading for time to perform their contractual obligations. Thus on the authority of *Moreton v Montrose Ltd*

which was approved by the Court of Appeal and Federal Court, the doctrines of estoppel and waiver would operate to prevent the operation of the automatic termination clause. Estoppel would apply in this case as the parties had proceeded on the assumption on the basis that the contract subsisted. In the well known case of *Amalgamated Investment & Property Co Ltd (in liquidazion) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, Lord Denning MR summed the principle as follows (cited in our Court of Appeal case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331):

> When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[14] In the instant case, even if the defendant had made a mistake or misinterpreted the automatic termination clause which renders the agreement 'null and void' and proceeded to act as if the agreement existed, they are bound by that mistake and cannot be allowed to go back on it. Lord Denning MR in the above mentioned case said as follows on the issue of wrongful interpretation or mistake:

> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, *they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not.* Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

[15] The doctrine of waiver would also disentitle the defendant from relying on the automatic termination clause. In the case of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 which was cited by counsel for the plaintiff, there was a time stipulation for the delivery of houses by the appellant. The appellant failed to meet the deadline. The agreement did not provide for extension of time. However, the respondent did not choose to treat the contract as having been repudiated. The Federal Court held that the appellant waived his right to rescind the agreement:

> In this case obviously he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, the appellant must be held to have waived his right to rescind the agreement on account of

repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing.

[16] Similarly, in the instant case, the time stipulation in respect of the submission of the building plan was allowed to pass by both parties and subsequently the defendant applied for extension of time for the approval of the plans. In fact, the former solicitors of the defendant apparently agreed to the 'termination' on 23 May 2012. They said as follows in their letter dated 28 May 2012 in respect of the termination letter of the plaintiff dated 23 May 2012:

> Nevertheless we have been instructed by our client that *they are only agreeable to the early termination* and return of the advance rental subject to deduction of the expenses and costs incurred by them. (Emphasis added.)

[17] In the premises, it is too late for the defendant to invoke the automatic termination clause. I am mindful that counsel for the defendant submitted that cl 4 uses the phrase 'null and void' and therefore the agreement had become automatically null and void when the defendant failed to submit the plan within two months of the date of the agreement. In my opinion, the phrase 'null and void' makes no difference as the defendant had conducted his dealings with the plaintiff on the assumption, whether by mistake or otherwise, that the contract subsisted. Therefore, the agreement was not rendered 'null and void' but continued by the implicit agreement of the parties until it was expressly terminated by the plaintiff when the defendant failed again to meet another deadline, ie the deadline to obtain approval for the building plan. Furthermore, the defendant is the wrongdoer and therefore should not be allowed to take advantage of his own wrong.

CONCLUSION

[18] In conclusion, I shall answer the first question in the negative and hold that the agreement was not rendered 'null and void' when the defendant missed the deadline to submit the plan for approval. In the premises, it is unnecessary to answer the second question. Nonetheless, for sake of completeness, I am of the view that since the answer to the first question is in the negative, the plaintiff was well within their contractual rights to terminate the agreement. I also find that the plaintiff were within their contractual rights to call on the performance bond that was given by the defendant for the following reason. Clause 5 of the agreement provides that the failure of the defendant to obtain the building approval would entitle the plaintiff to call on the performance bond. There is no dispute that the defendant had failed to obtain approval of the building plan.

[19] For all the above reasons, the counterclaim of the defendant is dismissed with costs of RM15,000.

Defendant's counterclaim dismissed.

Reported by Dzulqarnain Ab Fatar